actual intent to deceive,—an intent which may be derived from the facts and circumstances, but which must be established. *Id.* 676. That false and fraudulent representations may be made with respect to the curative effect of substances is obvious. It is said that the owner has the right to give his views regarding the effect of his drugs. But state of mind is itself a fact, and may be a material fact, and false and fraudulent representations may be made about it; and persons who make or deal in substances or compositions alleged to be curative are in a position to have superior knowledge, and may be held to good faith in their statements. (Citing cases.) It cannot be said, for example, that one who should put inert matter or a worthless composition in the channels of trade, labeled or described in an accompanying circular as a cure for disease, when he knows it is not, is beyond the reach of the lawmaking power. Congress recognizes that there was a wide field in which assertions as to curative effect are in no sense honest expressions of opinion, but constitute absolute falsehoods, and in the nature of the case can be deemed to have been made only with fraudulent purpose. The amendment of 1912 applies to this field and we have no doubt of its validity.'" (Emphasis added.)

(b) Where different schools of thought exist which are both practiced and where the subject truth of neither can be scientifically demonstrated, the correctness of the claims of one school should not be passed upon by the opinion of adherents of another school who are hostile to it.

Bush v. Cress, 181 Minn. 590, 233 N. W. 317;
Williams v. Marini, 105 Vt. 11, 162 Atl. 796;
78 *A. L. R.* 697—note at page 699.

(c) The Federal Trade Commission Act and the Pure Food and Drug Law recognize the existence of the homeopathic theory of medication separately and on an equal footing with the allopathic theory.

15 *U. S. C. R.*, par. 55-c.

21 *U. S. C. A.*, 321-c.

Dunn, Federal Food Drugs and Cosmetic Act, p. 822:

> "The bill (Food, Drugs and Cosmetic Act) is not intended to restrict, in any way, the availability of drugs for self-medication. On the contrary, it is intended to make self-medication safer and more effective."

The foregoing quotation, cited in *Dunn* op. cit. is contained in Committee Report No. 2139, Seventy-fifth Congress.

(d) The congressional debates on the Wheeler-Lee Act indicate that Congress considered, but thought unnecessary, certain provisions safeguarding the right of persons to disseminate their honest opinions with respect to the therapeutic value of medical preparations.

Dunn, Wheeler-Lee Act, pp. 170-172.

(The quotations in that book, set out in the appendix to this brief, are taken from the Committee Report to the House of Representatives, Seventy-fifth Congress, First Session, No. 163.)

II.

An Administrative Body Should Not be Permitted to Use at its Hearings Confidential Reports Made by its Investigators for the Purpose of Refreshing Such Investigator's Memory Without Exhibiting the Confidential Reports to the Opposite Side.

(a) Under the common law rules of evidence the opposite party has a right to examine any memorandum that is used by the opposite side for the purpose of refreshing its witness' memory.

> *Jones, Commentaries on Evidence,* Second Edition, vol. 5, pp. 4683-4685.

(b) While in England, in *Local Government Board v. Arlidge* (1915), A. C. 120, the use of a confidential report was considered proper, the use of such reports under the Constitution, is improper unless considerations of policy require that the Government's channels of information be kept secret.

Ernst Freund states in his *Administrative Powers Over Persons and Property,* p. 159, with respect to the value of *Local Government Board v. Arlidge* as a precedent in the United States:

> "It must, of course, be remembered that in England there are no constitutional requirements or limitations controlling statutory powers."

And on page 161 of the same work the author says of the *Arlidge* case:

> "The decision of the House of Lords cannot be considered otherwise than holding that upon the construction of the statute the applicant is not entitled to be informed of the entire case against him."

(c) The constitutional guarantees of due process as they exist in this country are held not to permit the consideration or use of any information in administrative proceedings which has not been submitted to the opposite party.

Morgan v. U. S., 304 U. S. 18 (82 L. Ed. 1129);

U. S. v. Abilene etc. R. Co., 265 U. S. 274 (68 L. Ed. 1016);

B. & O. R. Co. v. U. S., 264 U. S. 258, 44 Sup. Ct. 317, 68 L. Ed. 667.

(d) With respect to the propriety of permitting a witness to testify from a confidential memorandum to an administrative agency without submitting the same for inspection to the opposite party, the following language from the California case of *Kelliher v. Ray*, 43 Adv. Cal. App. 284, 285; 110 P. (2d) 712 should be persuasive:

> "In testifying he referred to his notes, stating he based his testimony upon such notes, and that without them he could not recall what measurements he had taken, as he had investigated many accidents between the date of that accident and his appearance in court.
>
> When counsel for plaintiff asked permission to examine the notes and demanded that they be placed in evidence the witness refused to produce them upon the ground they were confidential reports of the Motor Vehicle Department. The contention of the witness was upheld by the trial court, and it is the

refusal of the court to direct the witness to produce these notes that reversible error is here claimed."

The judgment of the trial court was reversed on the sole basis of this error.

(e) Toward the close of the opinion of the Circuit Court of Appeals [R. 909], the use of the confidential memorandum is discussed. It is stated that petitioner does not claim to have been prejudiced by this action. This assertion is based on a quotation of one sentence from petitioner's brief in which she stated that she could not be prejudiced if the confidential report was not used by the Commission in reaching its conclusion. From that statement the Circuit Court concludes that since no prejudice in using the confidential memorandum during the trial was shown, there was no prejudice in fact. We submit that this statement is obviously incorrect and misconstrues petitioner's language in her brief. Naturally, a litigant who is denied access to a confidential document submitted to an adverse witness is unable and powerless to demonstrate that a prejudice has resulted. It should be held that under such conditions the violation of the rules of evidence raises the presumption that there was prejudice.

III.

The Record Reflects a Conflict of Opinion on the Therapeutic Properties of Petitioner's Products Between the Homeopathic and Allopathic School of Medicine.

The concurring opinion [R. 909-911] states succinctly the problem which petitioner presented to the Circuit Court of Appeals. It says:

> "Petitioner does not question the rule that the findings of the Commission, if supported by evidence, are conclusive. She concedes that there is opinion evidence which supports the findings. Her position is that the Commission has no authority under the law to make an arbitrary choice between conflicting opinions of recognized schools of medicine. She says the rules of evidence require that 'where different schools of thought exist, which are both practiced and where the objective truth of neither can be scientifically demonstrated, the correctness of the claims of one school ought not to be passed upon by opinions of adherents to another school who are hostile to it.'
>
> If the case made before the Commission squarely presented the situation assumed, I think petitioner's argument would have to be sustained; but as I read the record it does not in any realistic fashion disclose a conflict between opposing schools of practice or opinion." [R. 910.]

Petitioner believes and respectfully submits that the record does reveal this "conflict between opposing schools

of practice or opinion." We refer to the tabulation at the end of our petition for the writ. It shows the various places in the transcript in which homeopathic physicians testified. These references show that the experts testifying at those places were adherents to the homeopathic school, and judged petitioner's products from the standpoint of homeopathic teachings.

Respectfully submitted,

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APPENDIX "A" TO BRIEF.

Dunn, Wheeler-Lee Act, pp. 170-172, 318.

"A problem of some diffculty exists in the case of advertisements where there are differences of opinion. Perhaps the problem is most acute in the case of claims regarding the curative effect of drugs. The difficulty has two aspects—one of policy and the other of congressional power.

"As to the policy, there is no intention to punish an advertiser for making a statement which he had good reason to believe was true, if made in such manner as to be not misleading. On the other hand, it is not desired to permit an advertiser to make a representation as to therapeutic effect, for example, in such manner as to be misleading, merely because he can find some expert opinion to support his claim.

"As to the legal problem, it is a well-known principle of law that a statute providing punishment for the commission of an offense must describe the offense with a reasonable degree of certainty. There are clear implications in cases arising under the Food and Drugs Act of June 30, 1906, that Congress may not penalize the making of a statement or representation regarding the truth of which, qualified opinion differs. (Seven Cases v. United States, 239 U. S. 510: United States v. Johnson, 221 U. S. 488.) See also American School of Magnetic Healing v. McAnnulty (198 U. S. 94.)

"The reason for this limitation on the power of Congress is apparent. Whether an advertisement would be misleading in a material respect and thus be a false

advertisement, would depend, in a prosecution, on whether the jury found it to be misleading.

"If Congress were to provide that a representation, as to the correctness of which qualified opinion differed, would be misleading if the jury agreed with the experts holding one view, but not misleading if the jury agreed with the experts holding the other view, it will be seen that the advertiser would not be able to tell in advance whether his advertisement violated the statute. There would therefore exist the kind of uncertainty which would invalidate the statute. On the other hand, it is undesirable to permit misleading claims to be made simply because experts can be found to substantiate them.

"It is in the light of these considerations that the committee on the advice of the House Legislative Counsel, included in the definition of 'False Advertisement' the following provision:

> 'but if, at the time of the dissemination of the advertisement, there exists a substantial difference of opinion, among experts qualified by scientific training and experience, as to the truth of a representation, the advertisement shall not be considered misleading on account of such representation, if it states clearly and prominently the fact of such difference of opinion. Nothing in this paragraph shall be construed as requiring the making of such statement as to difference of opinion; and failure to so state the fact of such difference of opinion shall not relieve the Government of the burden of establishing the misleading character of the representation.'

"This provision does not increase the burden of the accused in making his defense, but affords him an opportunity for his own protection where uncertain as to his rights.

"What this provision does is to afford the advertiser a means of knowing how he can, with certainty, establish his innocence under the statute, thus removing the danger of invalidity growing out of alleged uncertainty. It applies only in the narrow class of cases where such difference of opinion exists, and it does not, it should be noted, require the inclusion in the advertisement of a statement as to the difference of opinion. Whether or not such a statement is included, the basic question as to whether the advertisement is misleading always remains to be determined.

"It is to be noted that the difference of opinion involved is one existing at the time the advertisement is disseminated. Therefore, if it is necessary to establish in court the existence of such a difference of opinion, it will be done by testimony as to the state of expert opinion on the trial or by testimony of individual experts as to their opinion regarding the truth of the representation. There is no obligation on the advertiser to publish a statement that there is a difference of opinion as to the product he advertises. He may avail himself of such a defense if he desires to do so. Whether or not he does so does not relieve the Government of carrying its burden of establishing the misleading character of the false

advertisement. Thus the misleading character of the representation will be a burden for the prosecution to prove in every case and the truthfulness of the representation may be a defense in every case (pp. 170-172).

* * * * * * * * *

"The new section 15 (a), in section 2 of the House Amendment, relating to the definition of the term 'False advertisement' contained a provision that if, at the time of the dissemination of an advertisement, there existed a substantial difference of opinion among experts as to the truth of a representation, the advertisement should not be considered misleading on account of such representation if it stated clearly and prominently the fact of such difference of opinion. There was no similar provision in the Senate bill. After consideration in conference the House conferees concluded that this language was unnecessary for the purpose of the legislation and the conference agreement eliminates this provision from the House amendment" (p. 318).